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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 686

MARIA LUISA CRUZ de ORONA,
Petitioner-Appellant,

—against—

ANGELA ORONA, as Administratrix *de bonis non* of the Estate of Santiago Orona, deceased,
Plaintiff-Respondent,

—against—

ISBRANDTSEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,
Defendants-Respondents.

PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY SCHMUKLER,
Attorney for Plaintiff-Respondent,
121 Schermerhorn Street,
Brooklyn 1, New York.

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Petitioner does not append, as required by Rule 23(j), the judgments of the Court of Appeals and the District Court, which are sought to be reviewed.

Furthermore, this petition is not timely made. It was filed in this Court on January 26, 1962 and the order of the Court of Appeals was filed on October 23, 1961. Thus more than 90 days elapsed from the time of the filing of the order in the Court of Appeals to the time of filing of this petition.

STATUTES INVOLVED

In addition to statutes set forth in the Appendix to the petition at page 13, we note the following statutes.

Rule 17 (b) of the Federal Rules of Civil Procedure sets forth:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. * * * In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. * * *"

Rule 24 (c) of the Federal Rules of Civil Procedure states:

> "Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene."

We also note Section 118 of the Surrogate's Court Act of the State of New York, which states:

> "Section 118. Who entitled to letters of administration. Administration in case of intestacy must be granted to the person entitled to take or share in the personal property, who are competent and will accept the same, in the following order: 1. To the surviving husband or wife. * * *"

STATEMENT

The facts are as stated in the memorandum and order of the Hon. John F. X. McGohey, more especially on pages 10

and 11 of the Appendix to the petition. The plaintiff-respondent notes the following additional facts. The petitioner-appellant did not oppose the substitution of the plaintiff-respondent, but thereafter made so many motions that were calculated to delay and impede the trial of this case which was at the head of the #3 Ready Calendar for almost eight months. The case has now been removed from said Calendar.

By motion returnable May 9, 1961 petitioner-appellant requested permission to reargue this order of April 17, 1961 and now for the first time asks to intervene. The moving papers consisted of a notice of motion, the affidavit of Kenneth Heller, Esq., the attorney for petitioner-appellant and a memorandum of law. No proposed pleading was annexed setting forth the claim or defense for which intervention was sought as is required by Rule 24(c) of the Federal Rules of Civil Procedure. An order dated May 16, 1961, denying said motion was made by the Hon. John F. X. McGohey, in which it is stated:

> "The present plaintiff is the duly appointed Administratrix. She is therefore 'bound as fiduciary to represent all and to prosecute the claims of all possible beneficiaries' as defined under both the Jones Act and the Death on the High Seas Act. Illegitimate children are included among such beneficiaries. Civil v. Waterman Steamship Co., 2 Cir. 217 F.2d 94. Moreover, there is no showing, other than wholly unsupported conclusory allegations, that the interests of the Administratrix are adverse to those of the infant or indeed of the movant, or that the Administratrix will not discharge her fiduciary duties faithfully. * * * The interests of the infant and the movant and even the latter's attorney are in all respects protected."

A proceeding brought in the U. S. Circuit Court of Appeals for the Second Circuit, by the petitioner-appellant to mandamus said Hon. John F. X. McGohey to grant the relief sought on the above motion was denied on May 24, 1961.

A notice of appeal was filed on June 13, 1961 on behalf of the petitioner-appellant in which she is described as follows, "the Guardian Ad Litem hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the final order of the Hon. John F. X. McGohey entered on May 16, 1961". No guardian ad litem has ever been appointed in this action. No notice of appeal has been filed by petitioner-appellant from the memorandum and order dated April 17, 1961 which is recited on pages 10 and 11 of the petition.

Petitioner-appellant's time to file her brief on appeal was extended by an ex parte order up to October 8, 1961 and no further extension of time has been granted or stipulated. Petitioner-appellant, by motion returnable to the United States Court of Appeals for the Second Circuit, applied for permission to file her brief on appeal in "*forma pauperis*" and this was denied. An application was then made for an extension of time for 30 days to file briefs on appeal and this was also denied. Plaintiff-respondent's motion to dismiss the appeal herein was granted on October 23, 1961 by said Court for lack of merit in the appeal.

THE COURT OF APPEALS WAS CORRECT

There was no basis in law or in fact to reach any other decision. The Court was cognizant of the countless delays to the trial of this action. Justice delayed is justice denied. The federal rule of civil procedure relating to intervention of right was not intended to enlarge upon jurisdiction of the federal district court (Fed. Rules of Civ. Proc. Rule 24(a); 28 U. S. C. A.; *Bantell* v. *McGrath*, 215 F. 2d 297).

Courts should be zealous to protect the rights of those who have sought their forum and not permit those rights to be delayed and deferred except in cases where present justiciable rights of other claimants are directly involved (*Kelley* v. *Pascal System, Inc.*, 183 F. Supp. 775).

THE WRIT SHOULD NOT BE GRANTED

There is nothing in this case, or in petitioner's argument, to bring it within this Court's established grounds for certiorari.

There is no alleged conflict with any decision of this Court or between the Court below and any other Court of Appeals. The fact that it is claimed certain isolated District Courts held to the contrary is surely not sufficient.

AS TO THE QUESTION PRESENTED

The Hon. John F. X. McGohey, who was cognizant of all the facts, made this finding in his order dated May 16, 1961:

> "Moreover, there is no showing, other than wholly unsupported conclusory allegations, that the interests of the Administratrix are adverse to those of the infant or indeed of the movant, or that the Administratrix will not discharge her fiduciary duties faithfully."

The plaintiff-respondent is represented by an attorney admitted to practice before this Court. The Court must assume that the Administratrix will carry out her sworn duty and that her attorney will carry out his sworn duty as an attorney admitted to practice in this Court.

No statute confirms an unconditional right to intervene (*Basle Theatres, Inc.* v. *Warner Bros. Pictures Distributing Corp.*, 24 F. R. D. 476). The right to intervene presupposes existence of action brought by proper plaintiff (*American*

Trucking Ass'ns, Inc. v. U. S., 170 F. Supp. 38, 4 L. Ed. 2d 53). The term "intervention", connotes admission by court's leave, of person, who was not an original party to pending legal proceedings, as a party thereto, for protection of right or interest alleged by him to be affected by such proceeding (*American Bowling Supply Co. v. Al Martin, Inc.*, 96 F. Supp. 35; *Magee v. McNany*, 10 F. R. D. 5).

The question also arises whether the motion for intervention was timely and if the proper procedure for intervention was complied with. The question whether an application for permission to intervene is timely filed must be determined by an exercise of discretion of district court, in view of fact that federal rules regarding intervention require timely application, but are silent regarding what constitutes timely application (Fed. Rules of Civil Proc. Rule 24; 28 U. S. C. A.; *Mullins v. De Soto Securities Co.*, 2 F. R. D. 502, appeal dismissed 136 F. 2d 55). There has been no showing of abuse of discretion in this case, as the application to mandamus Judge McGohey was denied. The *Mullins* case, *supra*, also held:

> "Under federal rule permitting intervention of right when representation of applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by the judgment in the action, an application to intervene was defective, where unaccompanied by a proposed pleading. Fed. Rules of Civ Proc. Rule 24 (a) (c)."

The intervention rule was not intended to permit persons who are already before the court to file additional petitions in which they claim certain statutory or common-law rights (Fed. Rules of Civ. Proc. Rule 24; 28 U. S. C. A.; *U. S. A. for the Use of Ward Const. Service, Inc. v. U. S. Fidelity & Guaranty Co.*, 26 F. R. D. 568). The application herein for intervention was not timely, did not comply with the procedural requirements, and there was an express waiver by

the petitioner-appellant when she petitioned for the appointment of the Public Administrator to act as Administrator of the estate of the decedent and as the former plaintiff in this action.

"Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention" (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324, 56 S. Ct. 466, 472; 80 L. Ed. 688; *Barnard v. McGrath*, *supra*). Certainly Rule 24(a) F. R. C. P. does not grant the right of intervention to try an issue outside the scope of the § 17 proceedings, for it was not intended to enlarge upon the jurisdiction of the court (*Basle Theatres*, *supra*).

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

SIDNEY SCHMUCKLER,
Attorney for Plaintiff-Respondent.